4-663

(2D)

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et als.*
No. 121

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et als.*
No. 122

Petitioner's Motion for Leave to Present a Second Petition for Rehearing or Reconsideration of the Order Denying His Petition for Certiorari as Being Out of Time

ON

PETITION FOR (TWO) WRITS OF CERTIORARI

TO THE

UNITED STATES CIRCUIT COURT OF APPEALS
(EIGHTH CIRCUIT)

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"A case may not be brought here in fragments".
(Mr. Justice BRANDEIS in 252 U. S. 521, 522)

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If Your Honors Please:

Petitioner, S. Mayner Wallace, respectfully submits the above described MOTION upon each of the two grounds below specified.

The Petition for Certiorari presented the proposition (of first impression below and as yet undecided here) whether, under 73 (a) of the FEDERAL RULES OF CIVIL PROCEDURE, notice of an appeal, from a District Court to a Circuit Court of Appeals, may effectually be given within those first 10 days after judgment during which time an adversary party is now accorded the right, by 52 (b) and 59 (a, b & d) of the RULES, to move to modify the judgment or to move for a new trial—in other words, is any such attempt to appeal premature as being from a non-final judgment?

This Court denied certiorari in the view that the application therefor was not made here within the three months provided by law.

The question of the timeliness of that application arose out of the following situation wherein one single case below was considered, piecemeal, by the Court of Appeals:

In November, 1940, that Court decided the above stated proposition under the FEDERAL RULES by denying a motion to dismiss the main appeal and by granting a motion to dismiss a cross appeal in the said case; and, during the same Term, that Court thereafter heard that case on said main appeal and affirmed the judgment under review and, on March 5, 1941, denied a timely petition for a rehearing.

This Petition for Certiorari was then docketed here on June 2, 1941—or within three months from said March 5th.

Petitioner's respectful insistence is that said November orders were both interlocutory and not reviewable here until after the said final judgment in the Court of Appeals.

The Grounds

for this MOTION are these:

1. This Court has just recently granted a writ of certiorari (in No. 841 of the present Term—*Susan G. Reeves, petitioner,* v. *William Beardall, as Ex'or. etc.*—outlined briefly in an APPENDIX, *infra*) to review a ruling in the Court of Appeals for the Fifth Circuit in circumstances

calling for a consideration by this Court of *the same* legal principles that determine this matter of timeliness of petitioner's said Petition for Certiorari—as appears by quotations from opinions of this Court below herein under the following ARGUMENT.

2. That this MOTION is meritorious (as shown by the following ARGUMENT containing some new matter and additional citations) is a respectful conviction of the petitioner, a member of this Bar for nearly 25 years, who is also endeavoring to have some part, albeit modest, in the development of our FEDERAL RULES OF CIVIL PROCEDURE.

For brevity, petitioner's petition for a rehearing, timely filed but denied in an order entered here earlier in the present Term, is now incorporated by reference.

The determinative point is whether the said two November, 1940, orders in the Court of Appeals were final (as this Court seemingly has heretofore assumed) or interlocutory (as the petitioner respectfully contends).

The exact factual situation seems never to have been considered by this Court; but, in the light of the opinions in this Court, below cited, the logic and correctness of petitioner's position are, it is respectfully submitted, sound.

The Question

involved is more specifically stated as follows:

Where an appeal and a cross-appeal, to a Circuit Court of Appeals from a judgment of a District Court, cannot both be jurisdictionally valid (because of the lapse of more than three months between the times of the giving of the notices of same in the trial court) and the Court of Appeals sustains its jurisdiction of the appeal but dismisses the cross-appeal and, later, during the same Term, hears said appeal and affirms said judgment—does the time for certiorari (to review the sustention of said appeal and the dismissal of said cross-appeal) run from the time of the orders thereon or from the time of said final judgment?

Petitioner's respectful insistence is that, upon principle and in the light of the below cited cases in this Court, said orders were, in the recent language of this Court, merely "steps in a proceeding" and purely interlocutory and non-final until the time of said judgment.

(In the circumstances, the validation or the invalidation of either that appeal or that cross-appeal *automatically* invalidated or validated the companion appeal.)

The Facts

[*Same appear, also, in 115 F. (2d) 1003 and 117 F. (2d) 149*]

March 30, 1940, the District Court entered judgment (Rec. 8).

On April 9th (but within the 10 days after judgment) respondents, seemingly pursuant to Rule 73 (a) of the FEDERAL RULES OF CIVIL PROCEDURE, gave notice of their (the main) appeal to the Court of Appeals (R. 9).

Also, on said April 9th (but about 2 hours later in that day) petitioner moved, within the said 10 days, to modify said judgment—in clear accord with Rule 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE (R. 10).

July 25th following, the District Court entertained and denied (R. 12) that motion to modify and then, on July 29th, petitioner gave notice (R. 13) of his (the cross) appeal, from the said judgment, pursuant to said Rule 73 (a).

November 16, 1940, the Court of Appeals denied (R. 20) petitioner's motion to dismiss the main appeal. (The ground of that motion was that, under the said RULES, said appeal was prematurely taken from a non-final judgment.)

Also, on the same day, the Court of Appeals sustained (R. 21) respondents' motion to dismiss the cross-appeal. (The ground of that motion was that that appeal was not

taken within the three months from the entry of said judgment.)

November 27th, following, the Court of Appeals denied a petition for a rehearing of those rulings. Fiske, *et al.* v. Wallace and Wallace v. Fiske, *et al.*, 115 F. (2d) 1003.

Thereafter, on December 6, 1940, the Court of Appeals heard said main appeal and, on January 31, 1941, affirmed said judgment and, on March 5, 1941, denied (R. 57) a timely petition for a hearing of the merits. Fiske, *et al.* v. Wallace, 117 F. (2d) 149.

All of those rulings, in the Court of Appeals, were made and entered during its then November Term.

On June 2, 1941, within 3 months from said March 5, 1941, petitioner docketed here his Petition for (two) writs of certiorari to review the sustention of said main appeal and the dismissal of said cross-appeal.

On October 20, 1941, an order was entered here denying certiorari upon the ground that the same was applied for too late.

Thereafter, on November 10, 1941, petitioner's seasonably filed petition for a rehearing or a reconsideration was denied here.

ARGUMENT

(and Authorities not heretofore cited)

The two rulings of the Court of Appeals, in November, 1940, were both interlocutory; there was no final judgment there until March 5, 1941; and, therefore, it is respectfully urged, the Petition for certiorari, docketed here June 2, 1941, was timely presented—as is demonstrated by the quotations from the authorities in this Court below cited.

In the said circumstances, complete jurisdiction of the entire case was, *ex necessitate*, **retained** by the Court of Appeals until the final hearing, during the same Term, in that Court.

It is clear, of course, that said November order, refusing to dismiss the main appeal, could not have been reviewed until after the final judgment in March of 1941; and it is equally clear that the companion November order, dismissing the cross-appeal, could not sooner have been reviewed because

First, there was only one case below and this Court would not have reviewed the same in fragments or considered one of those November orders without the other since both orders were interdependent and essentially one and completely complementary, and

Secondly, each of those orders was, therefore, interlocutory since the Court of Appeals could have and might have changed its view (concerning its jurisdiction and the validity of those said appeals to it) at the time, during the same Term, of the final judgment in that Court.

The fact that the Court of Appeals, at the end, affirmed, rather than dismissed, the main appeal does not militate against the view that those November orders were interlocutory for, of course, that Court might, finally, have dis-

missed, rather than affirmed, said main appeal—in which event the November order, dismissing the cross-appeal, would have stood *automatically* vacated.

The quality of finality, in what was done in November, must, of course, be viewed as of that time. Finality is not determinable as of any other time. In other words, the element of finality in a judgment is not and cannot be dependent upon what is done later or by the course of future events.

Had this Court first reversed the order dismissing the cross-appeal, the Court of Appeals would, of course, have been in error in later affirming said judgment on the main appeal.

If the Court of Appeals had reversed said judgment and if this Court had sooner reversed the order dismissing the cross-appeal, the Court of Appeals would thereupon have been required to determine an appeal from a judgment that that Court had then already reversed.

Mr. Justice FRANKFURTER, referring, in Rochester Telephone Corp. v. United States, 307 U. S. 125, 131, to "the traditional criteria for bringing judicial action into play," recently emphasized, for the Court,

> "the procedural philosophy pertaining to the Federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of *interim steps in a proceeding.*" (*Italics* ours.)

Mr. Justice BRANDEIS, speaking for the Court, said:

> "Second: A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *(ca. ci.).* And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to **the whole subject-matter and as to all the causes of action** involved. *(ca. ci.).* * * *

"Only **one branch** of the case has been finally disposed of below, therefore none of it is ripe for review by this Court." (**Emphasis** ours.)

Collins v. Miller, 252 U. S. 364, 370-371

And he also wrote:

"A case may not be brought here in fragments. This Court has jurisdiction under sec. 238 of the Judicial Code, as under other sections, only from judgments which are both final and complete. *(ca. ci.)*. The case was not ripe for appeal."

Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522

Mr. Justice PITNEY, speaking for the Court, in a case where a second petition for a rehearing was filed and entertained below, said:

"Sec. 237, Judicial Code, both before and since the amendment of September 6, 1916, permits of the review by this Court only of the final judgment or decree of the highest State court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the State that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the State court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the State the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of a State court susceptible of being reviewed by this Court

would, notwithstanding that duty, be open at the same time to the power of a State court to review and reverse.' "

Chicago Great Western R. Co. v. Basham, 249 U. S. 164, 166-167

This Court, in Mountain Min. Co. v. St. Louis Min. & Mill. Co. (and Same v. Same), 186 U. S. 24, when dismissing two writs of error to a Court of Appeals because of the non-finality of the ruling there, stated (pp. 30-31) that the two records comprised the record in "one and the same case" and held that "part of the case" could not properly be in this Court and in the Court of Appeals at the same time.

Mr. Justice LAMAR, for the Court, wrote:

"The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the Act."

McLish v. Roff, 141 U. S. 661, 668

Mr. Justice SANFORD, for the Court, wrote:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of

error or appeal must be dismissed for want of jurisdiction."

Arnold v. Guimarin & Co., 263 U. S. 427, 434

The test of finality for judgments is, of course, the same in cases in the Courts of Appeal as in the trial courts where there is a cross-appeal or a cross-complaint.

"As we have said in Ayres, et al. v. Carver, et al., 17 How. 591, 'both the original and cross-bill constitute one suit,' and ought to be heard at the same time. Consequently, 'any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and * * * not the subject of an appeal to this court * * *.'"

Ex parte Railroad Company, 95 U. S. 221, 225

"Nor does it make any difference that the decree in the present case dismisses the cross-complaint of the defendants. The filing of the cross-complaint was not the institution of a separate suit, but grew out of the original complaint. There was but a single decree, and that was entitled in the original suit. The right of the defendants to appeal from the decree, so far as their cross-complaint is concerned, will be preserved; and time will run against them, as to all parts of the present judgment of the District Court, only from the time of the entry of a final decree after a hearing under the accounting which is to be had."

Winters v. Ethell, 132 U. S. 207, 210

And a decree by a Circuit Court dismissing a bill in equity as to one defendant who had demurred, leaving the case undisposed of as to other defendants who had answered, does not dispose of the whole case, and is not a

final decree from which an appeal can be taken to this Court.

Bank of Rondout v. Smith, 156 U. S. 330

Certainly this case is not the character of case in which this Court would have taken jurisdiction on certiorari *before* the appellate jurisdiction of the Court of Appeals was exhausted; while it has been positively ruled that a party's omission to apply here for certiorari to review an interlocutory decree cannot be prejudicial to his remedy later in this Court (John Simmons Co. v. Grier Brothers Company, 258 U. S. 82, 91; Rogers v. Hill, 289 U. S. 582, 588).

> "Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916."
>
> Bruce, Adm'r v. Tobin, 245 U. S. 18, 19

The foregoing authorities, in this Court, demonstrate that in these circumstances—

1. No ruling is reviewable here until the same acquires the element of finality—in other words, "interim steps in a proceeding" are not subject to review here prior to final judgment below.

2. A judgment, to be final, must be final as respects all of the phases of controversy involved—"the whole subject matter" and "all the causes of action involved" and "all the parties."

3. When "one branch" of a single case below has not been finally disposed of the case is "not ripe" for review here.

4. No case is reviewable here in "fragments."

5. No case can properly pend in this Court and in a Court of Appeals at the same time.

WHEREFORE, the petitioner, for the reasons aforesaid, prays that this Motion be granted and for a rehearing or reconsideration of the order of this Court denying certiorari as being out of time and that the (two) writs applied for be granted and for all proper relief in the premises; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. MAYNER WALLACE
Petitioner *pro se*

Certificate

The undersigned, S. Mayner Wallace, petitioner above, a member of the Bar of this Court, certifies that, in his opinion, the foregoing Motion is well founded; that the same is not interposed for delay but is presented and filed in good faith because he believes that the same ought to be granted.

S. MAYNER WALLACE
Petitioner *pro se*